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Nos. 184 & 185

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL, APPELLANTS

v. No. 184

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, RESPONDENTS

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLANTS

v. No. 185

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA; ET AL, RESPONDENTS

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF ARKANSAS

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MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; ET AL ..... *Respondents*

STATEMENT

The Attorney General of Arkansas appears as amicus curiae in this case (Rule 42 (4)) to protect the health of the people of Arkansas, and for this purpose he aligns himself with the Attorney General of Oklahoma in his appeal from the decision of the United States District Court for the Western District of Oklahoma holding invalid certain portions of the Oklahoma Act Relating to Visual Care, 59 Okla. St. Ann. §§ 941-947 (hereinafter termed the Oklahoma Act), as violative of the Fourteenth Amendment to the United States Constitution, 120 F. Supp. 128. The Attorney General of Arkansas believes that the decision is erroneous and fraught with danger to the health, not only of the people of Oklahoma, but of the people of Arkansas as well.

The law of Arkansas regulating the practice of optometry, Act 94, Ark. Acts of 1941, contains provisions substantially similar to Sections 2 and 3 of the Oklahoma Act. The Supreme Court of Arkansas has held the Arkansas law constitutional. *Melton* v. *Carter*, 204 Ark. 595, 169 S.W. 2d 425. If this Court approves the decision of the District Court in the case at bar, the result will be to imperil the pertinent Arkansas provisions.

The Arkansas Optometry Practice Act provides, in relevant part:

> Section 1. The practice of Optometry is hereby declared to be a *learned profession*, and the same rights, powers and duties are hereby declared to attach thereto as attach to other learned professions.
>
> The profession and the practice of Optometry is hereby defined to be the employment of any method or means other than the use of drugs, medicine, or surgery for the analysis of any optical defect, deficiency or deformity, visual or muscular anomaly of the visual functions, or the use of scientific instruments to train the visual system.
>
> Any person, who by any method or means other than the use of drugs, medicine or surgery analyzes or determines any optical defect, deficiency or deformity, or visual or muscular anomaly of the visual system, or who prescribes, dispenses, adapts, or duplicates lenses, prisms or ocular exercises for the correction, relief or aid of the visual function, or holds himself out as being able to do so shall be deemed to be engaged in the practice of Optometry.

Section 12. The following acts are hereby declared to be unlawful acts:

> (1) The violation of any of the foregoing provisions of this Act . . . (2) for any Optometrist, physician, or surgeon to advertise in any manner either directly or indirectly, any fraudulent, false

or misleading statement as to the skill or method of practice of himself or of any other Optometrist, physician or surgeon, or to advertise in any manner that will tend to deceive, mislead, or defraud the public, (3) for any person, firm, or corporation or any Optometrist, physician, or surgeon to advertise either directly or indirectly free optometric service or examination or to advertise directly or indirectly by any means whatsoever any definite or indefinite amount or terms as a fee for the professional services or materials rendered or furnished by an Optometrist, physician or surgeon, (4) for any person, firm or corporation or partnership not having a license to engage in the practice of optometry, (5) for any person, firm, or corporation to employ any optometrist, physician or surgeon to assist it in the unlawful practice of optometry, provided however, a licensed Optometrist, or partnership composed of licensed Optometrists may employ other licensed Optometrists in practicing optometry, (6) for any Optometrist, physician or surgeon to accept employment from an unlicensed person, firm or corporation or in any other manner to assist it or them in the unlawful practice of optometry, (7) for any person, firm, or corporation to give to any person eyeglasses, spectacles or lenses as a premium or inducement for the purchase of any goods, wares or merchandise, (8) for any person to impersonate a registered optometrist, or to buy, sell or fraudulently obtain a certificate of registration, and (9) for any unlicensed person, or any firm or corporation to publicly represent that he or it by himself or itself, or thru agents or employees is engaging in the practice of optometry or is qualified to do so.

Section 16. Nothing in this Act except as expressly provided otherwise herein shall apply to physicians and surgeons, nor to persons who sell eyeglasses, spectacles, or lenses at wholesale on prescriptions from optometrists, physicians, and surgeons, nor shall it prohibit the sale of ready-made glasses and spectacles when sold as merchandise at

established places of business, where no attempt is made to practice optometry.

The Oklahoma Act provides, in relevant part:

> Section 2. It [is] unlawful for any person . . . not licensed [to do so] to fit, adjust, adapt or in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or to hold himself out to the public as being qualified to do any of the acts listed . . ., except that persons licensed . . . may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith many measure, adapt, fit, prepare, dispense or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses.
>
> Section 3. It [is] unlawful for any person . . . to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms or other optical appli-

ances for visual correction . . . Nothing in this act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sun-glasses equipped with plano lenses nor with industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

Section 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction, to receive or accept any rebate, kickback, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed. . . .

It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization group or lay person and it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed. . .

No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.

The portions of the foregoing Sections 2, 3 and 4 which the District Court found to be unconstitutional are as follows:

> (1) Those portions of Section 2 which make it unlawful for any person not licensed to do so "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person. . ., or to duplicate or attempt to duplicate or to place or replace into the frames any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision . . ., except [upon written prescription of a licensed person]".
>
> (2) That portion of Section 3 which makes it unlawful "to solicit the sale of . . . frames, mountings, . . . or other optical appliances for visual correction".
>
> (3) That portion of Section 4 which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.

The essential similarity between the invalidated portions of Sections 2 and 3 of the Oklahoma Act to certain provisions of Sections 1, 12 and 16 of the Arkansas Optometry Practice Act is apparent.

ARGUMENT

I

There Is a Real and Substantial Relation Between the Pertinent Portions of Section 2 of the Oklahoma Act and the Promotion of the Public Health

In determining the constitutionality of an act of the legislature of a state relating to the health of its people, this Court is committed to the doctrine that when the subject lies within the state police power, "debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment". *Sproles* v. *Binford*, 286 U.S. 374. The range of the state's discretion in promoting the security and wellbeing of the public "accords with the subject of its exercise". *Sterling* v. *Constantin*, 287 U.S. 378. Where the end is one to which legislative power may be directed, it is enough "if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end". *Stephenson* v. *Binford*, 287 U.S. 251. In a word, the state's exercise of the police power for the protection of a valid public interest is not subject to judicial interference if the means employed are fairly adapted to that end. Thus if Section 2 of the Oklahoma Act bears "in any degree, or under any reasonably conceivable circumstances", an actual relation to the public health, it is valid under the Fourteenth Amendment to the United States Constitution as an exercise of the state's police power. In enunciating the rule that "debatable questions as to reasonableness are not for the courts but for the legislature", *Sproles* v. *Binford*, *supra*, this Court has already decided the case at bar. The question of the reasonableness of Section 2 of the Oklahoma Act is at the

very least "debatable". For example, one part of the section makes it unlawful for an unlicensed person to "fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person. . .". Section 1 of the Arkansas Optometry Practice Act provides punishment for any unlicensed person who ". . . dispenses, adapts, duplicates lenses, prisms . . . for the correction, relief or aid of the visual function. . .".

The Arkansas provision was attacked on the same ground which was here made the basis of attack, but was upheld and unanimously declared to be constitutional in all respects by the Supreme Court of Arkansas in *Melton* v. *Carter*, 204 Ark. 595, 164 S.W. 2d 425.

In that case, the quoted section was challenged on the ground that "optometry, not being comparable to law, medicine, or theology, is not a learned profession, being limited in its character because those engaged in the practice do not have the background, training, and education characterizing the three professions mentioned". It was further argued that "dispensing eye glasses is a commercial transaction, involving only such knowledge as is necessary to fill prescriptions written by optometrists or oculists".

In this connection, the Arkansas Court said, "In framing [the policy expressed in the act] the Legislature was not bound to provide for determination of the relative proficiency of particular practitioners. The Legislature was entitled to consider the general effect of the practices which it described, and if these effects were injurious . . . to counteract them. . ." "If optometry were a business rather than a profession requiring a high degree of skill and knowledge, the rights of appellees would be property. . ." "The challenged Act has for its purpose (or at

least the general assembly so found) the protection of those who *might* be . . . imposed upon by the unscrupulous practitioner." "But, believing as we do that no constitutional right has been invaded—although the legislative policy may be questioned by those who oppose the measure —we have no recourse but to say that the Act is valid, . . ." *Melton* v. *Carter, supra, passim.* If the highest judicial tribunal of the State of Arkansas believed that it had "no recourse but to say that the Act is valid", when considering a provision to all intents and purposes identical with Section 2 of the Oklahoma Act, how can it be said that the question presented here is not a fairly "debatable question" which is within the exclusive province of legislative judgment.

Optometry has been declared to be a learned profession by the Legislature of Arkansas, and this declaration was judicially sanctioned in *Melton* v. *Carter, supra.* If the practice of optometry is a learned profession in Arkansas, it is a learned profession in Oklahoma.

> Optometry is not a mere trade or craft. It is an applied branch of the science of physiological optics, directed to the improvement of visual acuity through the correction of refractive errors. It is concerned with the phenomena of light reflection and refraction. Optics is the science which treats of the nature and properties of light and vision; ocular refraction consists of the adaptation and accommodation of the light rays which enter the eye in keeping with optical principles, to secure proper focus and the formation of an accurate image on the retina. Optometry is directed to the measurement of the range of vision and the correction, by lens, of visual defects and the increase of visual power with a minimum of eye exertion. Thus, the practice of optometry calls for scientific knowledge and skill in the use of refractive media. Want of knowledge of the scientific principles and of the

mechanism of accommodation and loose practice are fraught with such danger to the delicate and vital organ of sight as to warrant strict regulation of the calling in the interest of health and safety; and, to that end, the State may adopt measures to insure technical knowledge and skill and proscribe practices and procedure that may be unexceptionable in the market place but do not comport with the standards of professional behavior commonly accepted today as essential to the practice of the healing art and its kindred pursuits relating to an anatomical and physical function. While not an oculist or an ophthalmologist, an optometrist is not a tradesman, or craftsman, but a practitioner in a specialized field of physical science intimately identified with the public health, even though he is not trained in pathology. The practice of optometry involves, not alone the measurement of the powers of vision, but also diagnosis and prescription for the revealed ocular deficiency or deformity or visual or muscular anomaly of the eye; and this calls for scientific knowledge of the anatomy of the eye and the principles of physical optics, the area of physics relating to the direction, reflection and refraction of light. The statutory definition of optometry coincides with the technical sense of the term. It consists of 'the employment of objective or subjective means, or both, for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its powers of vision and adapting lenses or prisms for the aid thereof'. * * * *

Thus, by its very nature, the practice of optometry is subject to regulation for the protection of the public against ignorance and incapacity and deception and fraud, equally with the practice of ophthalmology and the other 'learned professions', a category originally confined to theology, law and medicine, but long since broadened in keeping with the diffusion of scientific learning and the need of specialized knowledge in the functioning of our ever-

expanding and complex society. *New Jersey State Board of Optometrists* v. *S. S. Kresge Co.*, 115 NJL 287, 174 A 353 (Sup Ct.).

> But in the final analysis, it is the nature of the subject matter and the end to be served that determine the quality and content of the regulatory power. The public health is a paramount concern of government. Apart from the protection of the individual against incapacity and fraud, the correction of visual deficiencies bear a direct relation to the public safety and our general social and economic well being. The relationship is self-evident. The Legislature is invested with a broad discretion in the choice of means to serve this vital public interest, subject only to constitutional restraints and the rule of reason. If the measures invoked tend to serve a legitimate interest of society, the wisdom of the course taken is not ordinarily a justiciable question.

It is certainly a matter within the competency of the legislature to determine that all the matters contemplated by both Section 2 of the Oklahoma Act and Section 1 of the Arkansas Optometry Practice Act should be for the purposes therein expressed, considered as the practice of optometry, or regulable as such and prohibited to any except certain licensed persons. That this is within the proper power of the legislature is clearly recognized in *Dickson* v. *Flynn*, 246 App. Div. 341, 286 N.Y.S. 225; *Dellinger* v. *Ark. State Board of Optometry*, 214 Ark. 562, 217 S.W. 2d 338.

The record in this case is replete with facts which might well form the basis of such a legislative determination. The Court's attention is called to the following:

1. Sometimes prescriptions need to and do contain data regarding the desired distance of the lens from the eyes, and the angle of the lens to the eyes that should be followed in adapting glasses to the patient and which cannot be ascertained

from the glasses alone (Dr. Coston, R. 92, 103, 104; Dr. Clay, R. 228, 237; Dr. Benedict, R. 312, 313).

2. Post-operative prescriptions contain necessary information for adapting glasses to the patient which cannot be ascertained from the glasses alone (Dr. Braley, R. 339).

3. Duplication from prescription rather than glasses alone eliminates error that may result from lensometer reading (Dr. Coston, R. 105, 106, 107; Mr. Barber, R. 169, 170; Dr. Clay, R. 235; Dr. Stackpole, R. 250).

4. Prescription will show correct axis of lens whereas lens may have rotated in the frame and resulting lensometer reading would not conform to doctor's prescription for the axis (Mr. Hill, R. 138, 139; Mr. Barber, R. 165, 166; Dr. Clay, R. 236, 237).

5. Prescription will show correct optical center of lens whereas lens may have rotated in frame and resulting lensometer reading would not conform to doctor's prescription for the optical center (Dr. Clay, R. 236, 237).

6. Optician may undertake to duplicate from an inadequate fragment and furnish incorrect lens to patient, whereas prescription would give correct data for grinding and adapting (Dr. Coston, R. 106; Mr. Hill, R. 142; Mr. Barber, R. 165; Dr. Stackpole, R. 251; Dr. Braley, R. 348).

7. Prescription will indicate correct date of last eye examination and may suggest need for re-examination due to lapse of time (Dr. Coston, R. 109).

8. Lensometer can get out of adjustment, resulting in incorrect reading with patient being supplied with incorrect lens (Mr. Barber, R. 170; Dr. Clay, R. 235; Dr. Stackpole, R. 250, 251).

9. The element of human error in making lensometer reading is always present and may cause incor-

rect lens to be furnished the patient. This was clearly demonstrated in the court room by the respondents' witness, Hill, a dispensing optician, who misread the axis of the right lens of Dr. Duvall's glasses on the lensometer by five degrees (Mr. Hill, R. 125, 129, 140, 141; Mr. Barber, R. 169, 170; Dr. Clay, R. 236; Dr. Stackpole, R. 250, 251).

10. Repeated duplications from glasses alone, each within acceptable tolerance, could result in lens being furnished the patient which fail to correspond to doctor's original prescription (Dr. Coston, R. 106; Mr. Hill, R. 139; Mr. Barber, R. 170).

11. Professional men prefer duplications from prescriptions over duplications from glasses alone (Dr. Coston, R. 106, 107; Dr. Clay, R. 235; Dr. Stackpole, R. 250).

In view of the foregoing facts, it is difficult to understand how the District Court could find that "It is absolutely unnecessary to delegate to professional men the control of and responsibility for [the acts described in Section 2 of the Oklahoma Act]," 120 F. Supp. at 137, and that "the legislature has been guilty of undue oppression in failing to set up qualifying standards for the opticians if such standards be necessary for the public protection, and at the same time arbitrarily legislating many of the skilled artisans out of a long recognized trade, by delegating the sole control of their skills and business to a professional group, when the public can be completely protected without taking from the optician this valuable property right". 120 F. Supp. at 137. These statements characterize the opinion of the District Court. The opinion fails to take into account several factors. It ignores the eleven foregoing points of fact which, by themselves, are enough to supply a reasonable basis for the regulation involved. It ignores the fact that the right to pursue an occupation is

not absolute and static but may be expanded or contracted in the interest of the public health with the advancement of scientific knowledge and method. No doubt, at one time, it was thought that the right of the village barber to perform surgery was an indefeasible right. Today the notion is ridiculous.

As it was held in *Pierce Oil Corp.* v. *Hope*, 248 U.S. 498, a business once lawful may later, because of a changed situation, become a menace to the public health and be required to yield to the public good. It is familiar law that in the exercise of its police power a state may absolutely forbid as inimical to the public good the prosecution of a particular type of business. *Great Atl. & Pac. Tea Co.* v. *Grosjean*, 301 U.S. 412.

The opinion also ignores the fact that the states, under the federal system of government, have the widest discretion to determine as a matter of fact what means shall be employed to protect and promote the public health. It is evident that the legislature of Oklahoma deemed it expedient to entrust the acts involved, not to artisans or tradesmen restrained only by the morals of the market place, but to professional men restrained by a professional code of ethics and subject to strict police regulation. The optician has no right paramount to that of the general public, and it does not suffice to say that a police regulation cannot stand merely because it is economically inconvenient, or even disastrous, to the business of the optician, if in the judgment of the legislature it bears some reasonable relation to the public health. cf. *Breard* v. *Alexandria*, 341 U.S. 622.

II

The Prohibition of Section 3 of the Oklahoma Act Upon Soliciting the Sale of Frames, Mountings, or Other Optical Appliances for Visual Correction Tends to Prevent Fraud and Over-Reaching of the Public and to Promote the Public Health; Therefore, It Is a Permissible Police Regulation

The evils sought to be remedied by Section 3 of the Oklahoma Act are in no important respects different from the evils aimed at in the law prohibiting advertising in the field of dentistry upheld in the case of *Semler* v. *Oregon Board of Dental Examiners*, 294 U.S. 608. The statute involved there prohibited advertising or soliciting for dental work or advertising by means of representations of a tooth, teeth, bridge work or any portion of the human head. In considering the validity of the law, this Court said:

> We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The Legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.

This Court also remarked that the Oregon law was within the power of the state as a measure to prevent "luring the credulous and ignorant members of the public . . . for the purpose of fleecing them".

It is a matter of common knowledge that members of the public generally do not distinguish between ophthalmologists, oculists, optometrists and opticians. It is at least conceivable that the public might be deceived by the advertisements of opticians to believe that they are qualified to render services in addition to supplying frames and duplicate lenses which such opticians are not qualified or licensed to perform. The fact that such fraud and deception does occur and is aided by such advertising is the very reason for the enactment of such laws. If advertising of this sort is eradicated, it is obvious that its evil effects will in some measure be precluded.

The power of the state to regulate or restrict advertising of a commercial business dealing in optical goods has many times been upheld. See *State* v. *Rones*, 223 La. 839, 67 So. 2d 99, and as it was said by Circuit Judge Murrah in his dissenting opinion in this case,

> [there is] no doubt of the power of the legislature to regulate the advertising of the empty frames, mountings, and prisms and other optical devices if the object of such legislation is the prevention of fraud or mistake or to protect the public against deceptive practices in the broad field of visual care * * *. Considered in isolation, an eye glass frame or mounting is no more than a mere piece of merchandise. But considered in the context of the total field of visual care, it takes on a significant relationship to the visual needs of the public and ceases to be a mere piece of merchandise to be dealt with in the market place on an arm's length basis. 120 F. Supp. at 145.

Section 12 of the Arkansas Optometry Practice Act, in its total effect, contains proscriptions of the same acts which are prohibited by Section 3 of the Oklahoma Act. These prohibitions were held to be constitutional in *Melton* v. *Carter, supra.* When the same general type of provisions have been deemed constitutional by the Supreme Court of Arkansas, and when one of the judges of the United States District Court for the Western District of Oklahoma found a reasonable connection between the questioned provisions of the Oklahoma Act and the evils sought to be remedied, how can it be seriously urged that the question of reasonableness in the premises not one which is open to a difference of opinion (or is "debatable") which is a subject not properly within the purview of the courts, but is, instead, a subject exclusively within the province of legislative judgment. *Sproles* v. *Binford, supra.* Certainly, on this score there "can be seen that in [some] degree, or under [some] reasonably conceivable circumstances, there is an actual relation between the means and the end". *Stephenson* v. *Binford, supra.*

III

The Legislative Injunction of Section 4 of the Oklahoma Act Against Providing Space in a Merchandising Establishment to Persons Who Practice Optometry Is Not Unconstitutional Merely Because It Is Novel

Undoubtedly there can be found in the law of every state in the union provisions intended to prevent the corporate practice of the learned professions. The law reports abound with cases on the subject. The ingenuity which the corporate system is able to command, because of the wealth it commands, has made it a difficult task, to say the least, for the states to close the gap against the practice of such professions by corporations. Apparently the legislature of Oklahoma felt that the time had come

for it to exercise a measure of ingenuity in behalf of the people whose health it is the legislature's duty to protect. But the method which it employed is nonetheless valid.

It may be that many ethical persons will be subjected to inconvenience by the terms of the pertinent part of Section 4 of the Oklahoma Act. However, it is easy to see how, in the long run, the best interests of the public in general will be served by such a provision. For, as a practical matter, it is unlikely, so long as the practice of optometry and the art of visual care are permitted to share the same bed with mercantilism, that the vice, which it is the policy of the law to prevent, can be eradicated. The situation is poignantly analyzed by Circuit Judge Murrah in his dissenting opinion, 129 F. Supp. at 146.

In this connection, nothing is more appropriate than the words of Mr. Justice Holmes in *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110:

> We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *naturam naturae* as against the lawmaking power.

CONCLUSION

In view of the foregoing, it is believed that the decision of the United States District Court for the Western District of Oklahoma declaring Sections 2, 3 and 4 of the Oklahoma Act unconstitutional is erroneous; that its affirmance by this Court would seriously endanger the health of the people not only of Oklahoma but also of the State of Arkansas, and perhaps the people of other states; that the law in question should be approved by this Court for the protection of the public; and, that, therefore, the decision of the District Court should be reversed.

Respectfully submitted,

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